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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MR. A'S RESTAURANT,

Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSIAH L. NEEPER
2100 Union Bank Building
San Diego, California 92101
Telephone: 714/236-1661
June 12, 1981

Of Counsel:

Gray, Cary, Ames & Frye

Attorneys for Petitioner
Mr. A's Restaurant

PANDICK PRESS, WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

QUESTIONS PRESENTED[1]

1. Whether General Counsel bears the burden of proof that an employee's protected conduct is the dominant motive behind discharge in a dual motivation case.

2. Whether the Court of Appeals misapplied the standard of review of a National Labor Relations Board decision for each of the following reasons:

a. By failing to evaluate whether there was substantial evidence to support the Board's finding that the employer had transferred and threatened an employee in violation of 29 U.S.C. Section 158(a)(1) and (3).

b. By failing to evaluate whether there was substantial evidence to support the Board's finding that the employee had been accorded disparate treatment even though he was transferred to an equally prestigious work station.

c. By enforcing the Board's decision even though the Administrative Law Judge and the Board never evaluated whether a retaliatory motive was the dominant reason for discharge.

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[1] The parties to this proceeding are the National Labor Relations Board and Mr. A's Restaurant. The discharged employee is Mr. Mario Aguilar who is a member of Local 30, Hotel and Restaurant Employees and Bartenders of San Diego.

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TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, MR. A'S RESTAURANT, respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Ninth Circuit's enforcement of an order of the National Labor Relations Board.

DECISIONS AND ORDERS BELOW

The unreported decision of the Administrative Law Judge dated January 4, 1980 appears in the separately presented Appendices as Appendix A. The reported decision and order of the National Labor Relations Board, which is officially reported at 248 NLRB No. 127 (1980), is Appendix B. The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit filed on March 20, 1981 is Appendix C. The judgment of the United States Court of Appeals for the Ninth Circuit docketed on April 10, 1981 and filed on May 6, 1981 is Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 20, 1981. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 160(e):

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole should be conclusive."

STATEMENT OF THE CASE

Petitioner operates a restaurant known as Mr. A's in San Diego, California. Mr. Mario Aguilar was employed as a waiter by Petitioner until his discharge on March 2, 1979. A charge was filed with the National Labor Relations Board ("Board") alleging discrimination in regard to the hire, tenure,

terms and conditions of employment of Mr. Aguilar. The charge went to hearing in January, 1980. The Administrative Law Judge concluded that the Petitioner, Mr. A's Restaurant, had violated the National Labor Relations Act by threatening reprisals of physical force against Mr. Aguilar for filing grievances and by transferring his work station and then discharging him for having filed grievances. Although Petitioner excepted to these conclusions, the Board adopted the Administrative Law Judge's recommended decision with one exception.[2] The Board's application for enforcement of the order was granted by the Ninth Circuit in its memorandum decision of March 20, 1981.

Three issues have been consistently raised at each stage of the proceedings. First, whether Mr. Aguilar was transferred from the Rotunda section of the restaurant to the Grill because he asked that a grievance be placed in his personal employment file for future reference. Second, whether Mr. Aguilar's discharge resulted from his filing a second grievance relating to lockers, station assignments, meals and uniforms. Third, whether the restaurant manager's statement that he wanted to "chop Mr. Aguilar's head off" was a threat of physical reprisal resulting from Mr. Aguilar's filing of grievances.

Mr. A's Restaurant contends that Mr. Aguilar was transferred to a more favorable station as part of the customary practice of the restaurant. Mr. Aguilar was eventually discharged because he misappropriated another employee's tip. His discharge had nothing to do with any grievances he had filed. In fact, the only grievance that was actually filed, the second grievance, was filed after his discharge. Finally, Mr. A's Restaurant contends that the statements of the manager were in no way related to grievances that might have been filed by Mr. Aguilar. In fact, there has been absolutely no evidence

[2] The Board found that the Administrative Law Judge had incorrectly concluded that the Rotunda of the restaurant carried prestige because it was at "the top." The Board determined that "the top" referred to the location of the Rotunda, not its desirability as a station.

presented which would suggest that the manager even knew of the existence of any grievances of Mr. Aguilar at the time the statement was allegedly made.

REASONS FOR GRANTING THE WRIT

A. FIRST QUESTION

The federal courts of appeals and the National Labor Relations Board disagree on what role a retaliatory motive must play in a dual motivation discharge case, and which party bears the burden of proof on that issue.

The First Circuit applies a "dominant motive" test that places the burden of proof of the dominant motive of discharge on General Counsel. *Coletti's Furniture, Inc.* v. *NLRB*, 550 F.2d 1292 (1st Cir. 1977); *NLRB* v. *Fibers International Corporation*, 439 F.2d 1311 (1st Cir. 1971). The Ninth Circuit has devised a "but-for" test that appears to place the burden of proof on General Counsel to show that the employee would not have been discharged but for engaging in protected conduct. *NLRB* v. *Adams Delivery Service, Inc.*, 623 F.2d 96, 99 (9th Cir. 1980); *Stephenson* v. *NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1980). The Third Circuit has focused on the "real motive" for discharge, *NLRB* v. *Garry Manufacturing Co.*, 630 F.2d 934 (3d Cir. 1980); *Edgewood Nursing Center* v. *NLRB*, 581 F.2d 363, 368 (3d Cir. 1978), while the Fifth Circuit examines whether General Counsel has produced substantial evidence to show that an antiunion motive was "reasonably equal" to the employer's legitimate business justification. *NLRB* v. *Aero Corporation*, 581 F.2d 511, 514-515 (5th Cir. 1978). Although the tests in each circuit bear some similarities, they often lead to different conclusions. *E.g.*, *NLRB* v. *Houston Distribution Services, Inc.*, 573 F.2d 260, 265 (5th Cir. 1978), in which the court states it has not gone so far as to adopt the "but-for" test for determining union animus.

At the time the Board made its decision in this case,[3] the Board's standard in dual motivation cases required a showing by General Counsel that the discharge was "in part" motivated by protected conduct. *E.g., Youngstown Osteopathic Hospital Association,* 224 NLRB 574, 575 (1976). This is the standard that appears to have been applied in this case. The Administrative Law Judge did not specifically allocate the burden of proof to either party. However, he concluded that the discharge had been motivated by an intent to retaliate, and then examined whether Petitioner had demonstrated that the discharge resulted from misappropriation of a tip. Appendix A, pp. A13-A15.

The Administrative Law Judge prematurely shifted an evidentiary burden that should have remained with General Counsel until more than merely some evidence of improper motive had been established. The Ninth Circuit failed to address this issue in its memorandum decision (see discussion *infra* at p. 7), and the case should be remanded on that basis. Prior to remand, this Court should instruct the circuit courts and the National Labor Relations Board on what showing of motive is required in a dual motivation case and which party is to bear the burden of proof on that issue.

B. SECOND QUESTION

Supreme Court precedent is clear that the question of whether there is substantial evidence to support agency findings is ordinarily an issue to be resolved by the court of appeals.

[3] The Board's decision in the instant case is dated April 4, 1980. The Board's decision in *Wright Line,* 251 NLRB No. 150 (1980), is dated August 27, 1980. In *Wright Line,* the Board announces its decision to henceforth require General Counsel to prove that protected conduct was a motivating factor in discharging an employee, and if that showing is made, to shift the burden to the employer to show that the discharge would have occurred even in the absence of protected conduct. The *Wright Line* analysis is not significantly different from the test actually applied by the Administrative Law Judge in this case.

Universal Camera Corporation v. *NLRB,* 340 U.S. 474, 490 (1951). The Court will intervene only in rare instances when the standard of review appears to have been misapprehended or grossly misapplied. *Universal Camera Corporation, supra* at 491. Such is the case here.

The memorandum decision of the Ninth Circuit addresses only one of three issues raised by Petitioner — whether Mr. Aguilar was discharged because he filed grievances against his employer. The Ninth Circuit does not address whether there was substantial evidence to support the Board's finding that the transfer and threat to Mr. Aguilar were violations of the National Labor Relations Act. The court's wholesale failure to address two of three issues is a prima facie misapplication of the standard of review.

The Ninth Circuit's memorandum only addresses the substantial evidence to support findings relating to the motive of the employer. This Court has made it clear that in order for General Counsel to prove discrimination under Section 8(a)(3), General Counsel must establish both disparate treatment between an employee and his co-workers in discouragement of protected activities and that such disparate treatment was prompted by antiunion animus. *American Shipbuilding Company* v. *NLRB,* 380 U.S. 300, 311 (1965); *NLRB* v. *Brown,* 380 U.S. 278, 286 (1965). The Ninth Circuit nowhere addresses whether there was substantial evidence to support a finding that Mr. Aguilar's transfer could be considered disparate treatment. In fact, the evidence presented by Petitioner established that Mr. Aguilar was transferred to a station that was at least as profitable and probably significantly more profitable than his previous position. In addition, Mr. Aguilar's new station involved less work time, no greater amount of physical activity, and Mr. Aguilar was only one of three waiters transferred during the same period of time. Under these circumstances, there was no disparate treatment. The Ninth Circuit failed to address that issue.

Finally, the Ninth Circuit memorandum does not follow its own "but-for" analysis of discharge. *NLRB* v. *Adams Delivery Service, Inc.*, 623 F.2d 96, 99 (9th Cir. 1980); *Stephenson* v. *NLRB*, 614 F.2d 1210, 1213, (9th Cir. 1980). The Petitioner's evidence in this case established that Mr. Aguilar was discharged because he misappropriated another employee's tip. Further, Petitioner's evidence established that the grievance for which Mr. Aguilar was allegedly discharged was in fact not filed until after he had been terminated. Nonetheless, the Ninth Circuit upheld the Board's finding that the discharge was discriminatory. The Board's order was based upon the Administrative Law Judge's decision which simply concluded that the discharge of Mr. Aguilar "had been motivated" by an intent to retaliate against him for his having filed grievances. (Appendix A, p. A-13). Neither the Administrative Law Judge nor the Board addressed whether there was any evidence that the moving cause of the discharge was antiunion animus. The Ninth Circuit memorandum does not address the issue of whether the improper motive was the dominant motive or whether there was substantial evidence to support such a finding. Instead, the Ninth Circuit simply adopts the Board's decision which also failed to address this question.

This Court has frequenty stated that Congress has imposed on the court of appeals the responsibility for assuring that the Board keeps within reasonable grounds. Although the Board's findings are entitled to respect, they must be set aside when the record precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses, or its informed judgment on matters within its special competence or both. *E.g., Universal Camera Corporation* v. *NLRB*, 340 U.S. 470, 490 (1950). Careful consideration of all issues and a full review of the evidence before the Board is an essential part of the safeguarding process contemplated by Congress. The instant case is one in which the Ninth Circuit failed to properly scrutinize the Board's findings.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED: June 18, 1981

Respectfully submitted,

/s/

JOSIAH L. NEEPER, Esquire
2100 Union Bank Building
San Diego, California 92101

Counsel for Petitioner:

Of Counsel:

GRAY, CARY, AMES & FRYE